In *Sia Soon Suan* v. *Public Prosecutor*[4] the Federal Court found that a link in the chain of the prosecution evidence was broken and had not been repaired. There, Ong Hock Thye then acting C.J. found reasons to exonerate the Police from blame for the flaws that developed in the prosecution case. I regret that I can find no such reason in this case. Ong Hock Thye Ag. C.J. went on to state:

"Nevertheless the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else."

In the instant case although the accused appeared to have been caught red-handed there has been more than one material gap in the prosecution case. The appeal has to be allowed.

In hearing the appeal I had insisted that what transpired in the first trial and in the appeal from that trial is not relevant. But the question that has now risen is whether I should order yet another retrial. I considered that to arrive at a decision on that it would be relevant to find out, *inter alia,* what had happened earlier. I read the judgment of my brother Edgar Joseph Jr. and was startled to find the appeal was allowed by him because of the identical flaws that I have found in the prosecution case in the second trial. Although the prosecution were given a second bite they chose not to repair the break in the chain! In the circumstances there is no call to give the prosecution yet another opportunity to repair the break. That would amount to an injustice.

I allow the appeal and quash the conviction and sentence. The accused is discharged.

Exhibits to the Police for disposal.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

BANK BUMIPUTRA MALAYSIA BHD. & ANOR. v. LORRAIN ESME OSMAN

[O.C.J. (Zakaria Yatim J.) September 11, 1985]

[Kuala Lumpur – Civil Suit No. C 138 of 1985]

Practice and Procedure – Substituted service – Defendant outside jurisdiction – Defendant left country to evade service – Application to set aside order for substituted service dismissed – R.H.C. 1980, O.62 r.5(1) & O.41 r.5.

Practice and Procedure – Affidavit not disclosing source of information – Court cannot rely on such information – R.H.C. 1980, O.41 r.5.

In this case the defendant applied to have the order for substituted service on him set aside. The plaintiffs filed their writ of summons against the defendant but although every attempt to serve the writ on the defendant at his known address was made this was without success. The Senior Assistant Registrar granted an order for substituted service. Counsel for the defendant claimed that his client had left the country two months before the writ was issued and therefore the ordinary writ for service within jurisdiction should not be allowed to be served by way of substituted service. The plaintiffs did not admit that the defendant was out of the country on the date of the issue of the writ and submitted that the onus was on the defendant to show that he was out of Malaysia on January 10, 1985. It was submitted further that even if the defendant was not within the jurisdiction on the date of the issue of the writ, the defendant was evading service and the court should order substituted service.

Held: (1) the defendant had not discharged the onus to show that he was out of Malaysia on the date of the issue of the writ and the application should be dismissed on this ground alone;

(2) even if the defendant had left the country and was out of jurisdiction when the writ was issued, he did so in order to avoid service of the writ and on this ground too the application should be dismissed.

[**Editorial Note**: The decision of Zakaria Yatim J. in this case was upheld by the Supreme Court on November 1, 1985 *vide* Supreme Court Appeal No. 232 of 1985. For earlier proceedings see [1985] 2 M.L.J. 236.]

Cases referred to:

(1) *Fry* v. *Moore* (1889) 23 Q.B.D. 395, 397-398.
(2) *Wilding* v. *Bean* [1891] 1 Q.B. 100.
(3) *In re Urquhart* (1890) 24 Q.B.D. 723, 725.
(4) *Johannes Koplan* v. *Aw Chen* [1970] 1 M.L.J. 220, 221.

CIVIL SUIT.

T. Thomas for the plaintiffs.
Jeffrey Fernandez for the defendant.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the defendant (Lorrain) to set aside the order for substituted service granted by the Senior Assistant Registrar on February 8, 1985. Lorrain also asks the Court for an order that the service of the writ of summons be set aside.

The plaintiffs' claim against Lorrain is for a sum of M$27,652,853.06 which they alleged Lorrain received as constructive trustee for them. In their statement of claim, the plaintiffs averred that they are entitled under common law and/or under section 169 of the Contracts Act, 1950 to claim from Lorrain the said sum. The plaintiffs alternatively averred that Lorrain made secret profits to the extent of M$27,652,853.06 in the course of managing the plaintiffs' affairs. Further or alternatively, Lorrain is also liable to pay the plaintiffs under section 132(3) of the Companies Act, 1965 all profits made by him to the extent of M$27,652,853.06. According to the first plaintiff (the Bank), Lorrain was at all material times a director of the Bank and by reason of his position as director and/or agent was in a fiduciary relationship with the Bank. Lorrain was a subscriber to the Memorandum and Articles of Association of the second plaintiff (BMF) and its first director. Between January 1, 1977 and October 31, 1983, Lorrain was Chairman of the Board of Directors of BMF. He held the position of director and chairman as a nominee of the Bank with the express obligation to represent the Bank's interest on the Board. By reason of his position as director/chairman, Lorrain was in a fiduciary relationship with the Bank and BMF.

The plaintiffs filed their writ of summons against Lorrain for the said sum on January 10, 1985. Since the filing of the writ, the plaintiffs' solicitors made every attempt to serve the writ on Lorrain at his known addresses but without success.

The efforts made by the plaintiffs' solicitors to serve the writ on Lorrain were described fully in the affidavit of Mr. Lee Kim Cheng, a clerk working in the firm of the plaintiffs' solicitors, affirmed on February 5, 1985. On January 10, 1985, at 5.50 pm he went to Lorrain's residence at No. 26, Jalan Kia Peng but no one was there. At about 6.45 pm he again went to the same address and met the caretaker of the house. He enquired about Lorrain and was told that Lorrain was residing at No. 4, Jalan Stonor, Kuala Lumpur. He then went to Jalan Stonor and met a security guard at the gate of the premises. The guard told him that he had not seen Lorrain for sometime and that Lorrain could be contacted at his office, Aspatra Sdn. Bhd. at Wisma Stephen. On January 11, 1985, Mr. Lee went again to the house at Jalan Stonor but Lorrain was not there. He then proceeded to Lorrain's office at Wisma Stephen. There he was told by Lorrain's Secretary that Lorrain was not in. According to her Lorrain had not come to the office for sometime and she did not know whether Lorrain would come to the office or not. At 6.00 pm on the same day, he went again to the house at Jalan Stonor but he was told by the guard there that Lorrain was not in. When he wanted to enter the premises he was prevented by the guard. On January 19, 1985, the plaintiffs' solicitors sent, by an AR Registered Post, a copy of the writ together with a letter informing Lorrain that Mr. Lee would call on him. The letter was duly delivered to Lorrain as the AR card was returned by the Postal Authorities. On January 25, 1985 between 9.45 am and 10.00 am Mr. Lee went to the premises at Jalan Stonor to effect service of the writ. On the same day, Mr. Lee went twice to the same address, but Lorrain was not there. According to Mr. Lee, Lorrain had full knowledge that the plaintiffs' solicitors were trying to serve the writ on him but he wilfully evaded personal service.

On the basis of the evidence contained in Mr. Lee's affidavit and the exhibits thereto, in my view the Senior Assistant Registrar was right in granting the order of substituted service. It was impracticable for the plaintiffs' solicitors to effect personal service on Lorrain and under Order 62 Rule 5(1) the Senior Assistant Registrar was justified in making the order. Mr. Fernandez, counsel for Lorrain, conceded that the plaintiffs were entitled to obtain such order. In his submission he said, "This they (the plaintiffs) were entitled to do."

Mr. Fernandez, however, claimed that his client had left the country two months before the writ was issued. Therefore, he said, the ordinary writ for service within jurisdiction should not be allowed to be served by way of substituted service.

The application is supported by three affidavits. In all these three affidavits, the deponents averred that Lorrain left Malaysia at the beginning of November, 1984. I shall now examine these affidavits.

The first affidavit was affirmed by June Chan Suet Lai on March 13, 1985. She claimed to be

employed as Lorrain's confidential secretary since July, 1983. In the fourth paragraph of her affidavit she said, "The Defendant left Malaysia and went abroad on November 8, 1984 and has not yet returned to Malaysia." Mr. Thomas, counsel for the plaintiffs, told the Court that in paragraph 4 of the affidavit, the deponent did not disclose how she knew that Lorrain had left Malaysia on November 8, 1984. He added that the deponent failed to identify the source of her information. Paragraph 4, therefore, did not comply with the requirements of Order 41 Rule 5, which states:

"(1) ... an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) As affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

The Court, therefore, cannot rely on the information contained in paragraph 4 of June Chan Suet Lai's affidavit.

The second affidavit was affirmed by Raguan s/o Manickam on April 1, 1985. According to him he was Lorrain's personal driver for two and a half years. Whenever Lorrain flew in or out of the country, he sent him to the airport and fetched him when he returned. On November 8, 1984 he drove Lorrain to Subang Airport with his luggage. Lorrain told him that he was flying to Singapore and from there he would take a connecting flight but he did not disclose his destination. The deponent averred that he saw him check-in for this flight to Singapore. He further averred that he had not seen Lorrain since. If Lorrain had returned to Malaysia he was certain that he would be asked to fetch him. To the best of his knowledge no other employee had seen Lorrain in Malaysia. I should mention here that that part of his affidavit did not comply with Order 41 Rule 5.

The third affidavit was affirmed by Sonni Pillai on April 1, 1985. The deponent is an advocate and solicitor practising in Kuala Lumpur but lately he worked as the head of the Legal Department of the Arab Malaysian Merchant Bank Kuala Lumpur. He claimed that he had known Lorrain for over twenty years both as a close friend and as Lorrain's solicitor. According to him, Lorrain left Malaysia at the beginning of November, 1984 to live in a foreign country. He knew Lorrain's address and telephone number but he claimed that this information was privileged between client and solicitor. He claimed that since the beginning of January, 1985 he had spoken to Lorrain at his overseas address about three times a week. He said that since Lorrain left Malaysia in November, 1984 he had not returned to this country.

The plaintiffs filed their affidavit on April 4, 1985. The deponent, Johari bin Zakaria, the Manager of the Legal Department of the Bank, averred that the plaintiffs did not admit that Lorrain left Malaysia on November 8, 1984 and had not returned since. He said that the plaintiffs had no knowledge that Lorrain had left Malaysia on November 8, 1984. He averred that if Lorrain was not in the country when the writ was issued, he was merely temporarily absent from the jurisdiction, where all the rest of the time he was permanently residing within jurisdiction. He further averred that if Lorrain had left the country on November 8, 1984, he did so with the intention of evading service. The deponent further stated that Lorrain could have affirmed an affidavit himself but instead he asked his representatives to affirm affidavits on his behalf. The plaintiffs contended that, in the circumstances, Lorrain was not acting *bona fide* in his application to set aside the order for substituted service.

The plaintiffs did not admit that Lorrain was out of the country on the date in question. In his affidavit, Johari bin Zakaria said:

"... As far as the plaintiffs are concerned the addresses known to them at which Lorrain could be contacted are 26, Jalan Kia Peng, Kuala Lumpur and 4, Jalan Stonor, Kuala Lumpur, which were the addresses at which personal services were attempted. Neither Lorrain nor his representatives have so far given to the plaintiffs any other addresses (whether in or outside the jurisdiction) at which he could be contacted."

On July 16, 1984, when Lorrain appeared before the Ahmad Noordin Committee of Inquiry, he told the Committee that he had a small office in Singapore and he would be there for one or two days a week. He also told the Committee that "His place of contact would be his office 'Aspatra' in Wisma Stephens. He travelled quite a lot but his people would be able to locate him anywhere within 24 hours."

Mr. Thomas, counsel for the plaintiffs submitted that if Lorrain alleged that he was out of jurisdiction on the date of the issue of the writ then the onus lies on the defendant to show that he was out of Malaysia on January 10, 1985. According to Mr. Thomas, the onus could only be discharged

by Lorrain on oath. Curiously enough, Lorrain did not consider it fit to affirm an affidavit to state that he was not in Malaysia. Instead he asked the three persons to file their affidavits on his behalf. The Court cannot give such weight to the contents of the three affidavits. In my opinion Lorrain has not discharged the onus and on this ground alone his application should be dismissed.

Mr. Thomas further submitted that even if Lorrain was not within jurisdiction on the date of the issue of the writ, Lorrain was evading service and the Court should order substituted service. Mr. Fernandez submitted that Lorrain had left jurisdiction two months before the writ was issued. According to him, normally, in these circumstances the ordinary writ for service within jurisdiction would not be allowed to be served by way of substituted service. He added, however, that according to decided cases, if Lorrain had left the jurisdiction to evade service, substituted service might be ordered by the Court provided that the evidence satisfied the Court that Lorrain left the jurisdiction to evade service.

It is now necessary to examine the law with regard to substituted service of a writ for service within jurisdiction where the defendant is out of jurisdiction. The general principle was stated by Lindley L.J. in *Fry* v. *Moore*[1] as follows: "... if a writ could not be served personally at the time when it is issued, there cannot be substituted service. That is a sound principle ..." Thus, in *Wilding* v. *Bean*,[2] the English Court of Appeal held that, where a writ was issued in the ordinary form for service within jurisdiction against a defendant who, shortly before the issue of the writ had left England, and it did not appear that he had gone out of jurisdiction to avoid service of the writ, an order of substituted service of the writ could not be made. There is, however, an exception to the general principle. In *In re Urquhart*,[3] the Court of Appeal in England held that under rule 154 of the Bankruptcy Rules 1886, an order for substituted service of a bankruptcy notice or petition might be made, notwithstanding that the debtor was out of jurisdiction provided that the Court was satisfied by the evidence that he went out of jurisdiction in order to avoid service. In his judgment in that case, Lord Esher M.R., at page 725 said:

> "It is said that an order cannot be made for substituted service unless the debtor is within the jurisdiction; so that if the Creditor had known where he was, he could have been personally served with the notice. Is there any such restriction in rule 154? It says that the Court may order substituted service to be made, if it is satisfied by the evidence 'that the debtor is keeping out of the way to avoid such service' ... The words are quite general, and, in my opinion, if the Court is satisfied that the debtor has gone out of the jurisdiction to avoid service, an order for substituted service can be made ... In my opinion there was ample evidence to justify the registrar in coming to the conclusion that the debtor went away to Scotland to avoid service."

Although in *Urquhart's* case the order of substituted service was made under the English Bankruptcy Rules of 1886, the principle enunciated in that case applies to the present case. The Federal Court in *Johannes Koplan* v. *Aw Chen*[4] had followed the decision in *Urquhart's* case when considering whether an order for substituted service was properly issued under the Rules of the Supreme Court 1957.

Following the decision in *Urquhart's* case, if Lorrain was out of jurisdiction when the writ was issued, an order for substituted service may be justified if the Court is satisfied by the evidence that he went out of jurisdiction to avoid service.

I shall now examine whether there is evidence to prove that Lorrain went out of jurisdiction to avoid service.

The writ was issued on January 10, 1985. According to the affidavits of June Chan Suet Lai and Raguan s/o Manickam, Lorrain left the country on November 8, 1984 *i.e.* about two months before the writ was issued.

Lorrain was Chairman of the Board of Directors of the BMF and Director of the Bank. When he appeared before the Ahmad Noordin Committee on July 16, 1984, he was told that the Committee was probing deep into the affairs of the BMF particularly into the accounts, documents and the loans approved. He was asked to give his cooperation to the Committee. At Lorrain's request, the Committee agreed to forward to him a written questionnaire. The questionnaire was sent to him at the address given by him but despite reminders, he did not respond at all to the questionnaire. (See Johari's affidavit dated April 4, 1985 and exhibits thereto). Lorrain must have realised that by answering the questionnaire he would be exposing himself to criminal or civil proceedings. Johari bin Zakaria, in his affidavit, stated that in view of the widespread publicity given to the BMF affair by the mass media and the speculation from the middle of 1984 that criminal and civil proceedings might be instituted against Lorrain

for his involvement in the BMF affair, the plaintiffs had reason to believe that if Lorrain had left Malaysia on November 8, 1984, he did so in order to evade service.

If Lorrain left the country on November 8, 1984, he must have left in secrecy. He told the Ahmad Noordin Committee that his place of contact was the office of Aspatra Sdn. Bhd. in Wisma Stephens. Yet when Mr. Lee Kim Cheng, the clerk working in the firm of the plaintiffs' solicitors, went to the office on January 11, 1985 no one in the office knew where he was. In his affidavit, Mr. Lee said:

"On arrival at the defendant's office known as Aspatra Sdn. Bhd. which is situated at 14th Floor, Wisma Stephen, Kuala Lumpur, I enquired for the Defendant and was told by one Shamsul Kamariah binti Yahya, who claimed to be the Defendant's secretary, that the Defendant was not in. I asked her whether she was aware if the Defendant would be coming to the office on that day and her reply was 'the Defendant had not come to the office for quite sometime and that she does not know whether the Defendant would be coming to the office or not.' "

Sonni Pillai, in his affidavit in support of the application stated that Lorrain left this country and now lives at a fixed residential address in a foreign country. He did not name the country. He claimed to know Lorrain's address and telephone number in that foreign country but he could not divulge this information on the ground that the information is privileged between solicitor and client.

According to Sonni Pillai's affidavit, Lorrain left this country because of fears for his life and personal safety and that of his wife and child, on account of numerous death threats and threats of physical violence which had been made against him. Yet, in the same affidavit Sonni Pillai said that Lorrain intended to return for the trial of this action, which he would be contesting fully. If Lorrain intended to contest the action against him, why did he not enter appearance and file his defence instead of only entering conditional appearance? If he is seriously contesting the suit why did he not personally affirm an affidavit in support of the present application. It seems to me he wants to maintain the secrecy of his present whereabouts. If he affirmed an affidavit in a foreign country he is required, under Order 41 rule 1(4) of the Rules of the High Court, to state the place of his residence. Furthermore, the affidavit will show the place where he affirmed it. It is clear that Lorrain does not want to disclose where he is now. That is why he asked Sonni Pillai and the two other persons to affirm the affidavits in support of his application.

Again, if he is serious in contesting the suit, why did he not instruct his solicitors to accept service on his behalf. Mr. Fernandez told the Court that he had no instruction from his client to accept service. The solicitors for the plaintiffs wrote to Lorrain's previous solicitors and present solicitors informing them that the plaintiffs would not rely on the order of substituted service provided that the solicitors agreed to accept service on behalf of Lorrain. The offer had not been accepted. The plaintiffs contended that this was a lack of good faith on the part of Lorrain.

From the evidence stated above I am fully satisfied that, if Lorrain had left the country on November 8, 1984 and was out of jurisdiction when the writ was issued, he did so in order to avoid service of the writ.

In the circumstances, I dismiss the application with costs. Lorrain will have to file his defence within twenty-one days from today.

Application dismissed.

Solicitors: *Skrine & Co.; Fernandez & Co.*

SEASIANA SDN. BHD. v. SAAB SCANIA AB & ANOR.

[O.C.J. (Zakaria Yatim J.) September 16, 1985]

[Kuala Lumpur – Civil Suit No. C3039 of 1985]

Practice and Procedure – Writ – Defendants residing abroad – Writ issued without leave of Court to serve out of jurisdiction – R.H.C. 1980, O.6 r. 6(1) & O.11.

The defendants applied for an order that the writ of summons on/or service of the writ of summons on the 1st and 2nd defendants be set aside for non-compliance with R.H.C. 1980, O.6 r.6.

The writ in question was filed by the plaintiffs on June 7, 1985 and both the defendants' addresses were given as out of the jurisdiction of the court. The plaintiffs averred that the first defendant had appointed them as Saab Car franchise holder for the whole of Malaysia through the 2nd defendant. The plaintiffs alleged that, subsequently to such appointment, the defendants, in breach of the agreement between the parties, revoked the appointment. The plaintiffs filed an *ex parte* application for an injunction and such injunction was granted on June 13, 1985 restraining both